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No. 88-1157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARTIN MARIETTA CORPORATION,
Petitioner,

v.

WILLIAM C. POLLARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION

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The American Bar Association ("ABA") moves pursuant to Rule 36.1 of the rules of this Court for leave to file the annexed brief as *amicus curiae* in support of the petition for certiorari filed by Martin Marietta Corporation on or about January 12, 1989. The ABA wishes to support the petitioner's position that the Fourth Circuit's decision is important enough to merit plenary review. The ABA believes that the annexed brief will be of assistance to the Court. Although counsel for petitioner Martin Marietta Corporation consented to the filing of this brief, the consent of counsel for respondent Pollard was

requested but refused. The ABA therefore requests leave to file the annexed brief as *amicus curiae.*

Respectfully submitted,

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION

INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA") is a private association that serves as a spokesperson for the legal profession in this country. The scope of the attorney-client and work-product privileges is a matter that has long been of concern to the ABA and its members. In the past, the ABA has filed briefs as *amicus curiae* in *Hickman v. Taylor,* 329 U.S. 495 (1947), and *Upjohn Co. v. United States,* 449 U.S. 383 (1981), two of the leading cases delineating the contours of these privileges.

[1] This brief is accompanied by a Motion for Leave to File, consent of respondent having been requested but refused.

The issue raised in this case,[2] concerning implied waiver of the attorney-client and work-product privileges in the course of plea discussions with the government, is of comparable importance to the organized bar.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decision creates substantial uncertainty concerning both the existence and the scope of the implied waivers of the attorney-client and work-product privileges. This uncertainty in the law significantly impairs the ability of lawyers to provide responsible, effective legal representation and to give informed guidance to clients on matters relating to potential and ongoing litigation. Clarification of the law is critical to the interests of the organized bar and to the clients it serves.

The Fourth Circuit held that by disclosing to the government the results of an internal investigation of possible corporate wrongdoing, Martin Marietta Corporation impliedly waived its attorney-client and work-product privileges, with the result that Pollard, a third party, would be entitled to discovery of the documents on which Martin Marietta's representations to the government were based. The circuit court found the situation similar to those in which partial disclosure of privileged information is made during direct examination at trial.[3] The D.C. Circuit has taken a similarly broad view of waivers of the evidentiary privileges made outside the context of trial. *See In re Sealed Case,* 676 F.2d 793, 822-24 (D.C. Cir. 1982); *Permian Corp. v. United States,* 665 F.2d 1214, 1220-22 (D.C. Cir. 1981).

In contrast to the Fourth and D.C. Circuits, other courts have concluded that the scope of an implied waiver of the

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[2] *In re Martin Marietta Corporation,* 856 F.2d 619 (4th Cir. 1988).

[3] 856 F.2d at 624-26 (discussing *United States v. Nobles,* 422 U.S. 225 (1975)).

attorney-client or work-product privilege is very narrow when disclosures of privileged information are made outside the trial setting. *See, e.g., In re von Bulow,* 828 F.2d 94, 101-03 (2d Cir. 1987); *Diversified Indus., Inc. v. Meredith,* 572 F.2d 596, 611 (8th Cir. 1977) (*en banc*). These courts have determined that when a party discloses privileged information outside the judicial context, the party does not waive its privileges with respect to other information that was not disclosed, even if the undisclosed information concerns precisely the same subject matter as that which was disclosed.

The present unsettled state of the law is of concern to members of the bar and to the legal profession for several reasons. It is of concern to trial lawyers; in the course of litigation, lawyers customarily engage in settlement or plea negotiations, which the law generally encourages.[4] Attorneys and their clients need to know whether disclosures of privileged information made to the opposing party in such negotiations will result in the loss of attorney-client or work-product protection for the undisclosed underlying information and documents. In counseling clients and representing them in negotiations, trial lawyers are hampered by not knowing whether limited disclosures to the opposing party will later make it impossible to defend against demands for far broader disclosures made either by the opposing party itself or by third parties who become involved in future litigation.

The present state of uncertainty is also of concern to attorneys for corporate clients. In order to adequately advise corporate clients whether to undertake internal investigations, attorneys must know the extent to which the product of those investigations will be privileged. At present, attorneys for nationally-based corporations, which may be subject to rules of

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[4] *See, e.g.,* Fed. R. Evid. 408 (evidence of a settlement offer is inadmissible to prove liability); Fed. R. Evid. 410 (statements made in the course of plea discussions are generally inadmissible).

privilege which vary from court to court, are at a disadvantage in counseling clients and conducting corporate investigations.

The ABA believes that the comparatively limited case law at the federal appellate level concerning the issue raised by this case does not adequately reflect the importance of the issue, particularly because of the growth of corporate investigations and the ever-broadening scope of discovery under the Federal Rules of Civil Procedure. Questions concerning the scope of implied waivers of the attorney-client privilege generally arise in the course of discovery and usually are addressed only by the trial court, often in an unpublished order. The uncertainty of the law also influences the conduct of trial lawyers and corporate counsel in ways that are not overtly reflected in litigation but which have profound consequences for underlying litigation strategy. The ABA therefore believes that the Fourth Circuit's decision raises an issue of nation-wide significance that merits this Court's attention.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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